

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA)

Plaintiff,)

vs.)

ROBERT DAVID KAHRE, *et al.*,)

Defendants.)

2:05-CR-0121-RCJ-RJJ

ORDER

This matter comes before the Court on Defendant Robert Kahre's Objections to Magistrate Judge Johnston's Order Regarding Defendants' Motion to Disqualify Assistant United States Attorney Gregory Damm. (#1195.) Several Defendants filed Motions for Joinder to Defendant Robert Kahre's Motion as follows: (1) Alexander Loglia (#1215, #1317); (2) Myra Buonomo (#1281); (3) Lori Kahre (#1306); and (4) Joel Axberg (#1341). The Court has considered the Motions, the pleadings on file, and oral argument on behalf of the parties and hereby issues the following Order.

BACKGROUND

On April 22, 2005, Defendant Robert Kahre filed his Motion to Disqualify (#132) Assistant U.S. Attorney ("AUSA") Gregory Damm from participating in this case. Although Judge Johnston originally denied Defendant Kahre's Motion in a minute order, Judge Johnston later issued a written Order denying the Motion to Disqualify. (*See* #1101.) As discussed in this Court's prior Orders, on May 29, 2003, federal and state law enforcement agencies executed a

1 search warrant on several properties in connection with this case. In response to these searches,
2 several individuals filed a civil lawsuit against multiple entities and individuals involved with
3 the execution of the warrant. The civil action alleges that AUSA Damm orchestrated a “military-
4 style” raid, which violated Defendants’ constitutional rights. Based on the evidence obtained
5 from the searches, the United States filed a criminal indictment against Defendants on April 5,
6 2005. Defendants asked Judge Johnston to disqualify AUSA Damm from this case because
7 Defendants named him in the separately pending civil case. Defendants now ask this Court to
8 set aside Judge Johnston’s Order and disqualify AUSA Damm from the case.

9 DISCUSSION

10 Defendants ask the Court to overturn Judge Johnston’s Order and disqualify AUSA
11 Damm based on three main theories: (1) AUSA Damm violated DOJ policy and lied to
12 Magistrate Judge Johnston regarding such policy; (2) AUSA Damm violated statutory law
13 requiring disqualification; and (3) AUSA Damm’s status as a party in the *Bivens* action creates
14 an appearance of a conflict of interest requiring immediate dismissal under *Young v. United*
15 *States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). Defendant Loglia also argues that AUSA
16 Damm should be disqualified because he mailed a copy of the indictment to the University of
17 Las Vegas (“UNLV”) school of law where Defendant Loglia attended as a law student at the time
18 the Government obtained an indictment.

19 I. Standard of Review

20 A district court shall set aside any portion of a Magistrate Judge’s order that is “clearly
21 erroneous or contrary to law.” 28 U.S.C. § 636(b)(1)(A).

22 II. AUSA Damm’s Alleged Misrepresentation to Judge Johnston

23 Defendants argue that because AUSA Damm is a named defendant in the *Bivens* action,
24 he has a conflict of interest in prosecuting this case. Defendants argue that the Department of

1 Justice (“DOJ”) never reviewed AUSA Damm’s alleged emotional and pecuniary interest created
2 by the *Bivens* action, and never authorized him to prosecute this case. Defendants further allege
3 that AUSA Damm lied to Judge Johnston regarding his clearance for conflicts during oral
4 argument on Defendant Kahre’s Motion to Disqualify. At oral argument, Judge Johnston
5 inquired as to whether Mr. Damm had cleared any potential conflicts with the DOJ. AUSA
6 Damm responded that he had. Defendants claim this statement was an intentional
7 misrepresentation. The parties discussed this topic with Judge Johnston both at the original
8 disqualification hearing in 2005, as well as a separate hearing in May, 2006. The Court has
9 reviewed *in camera* documents and communications between AUSA Damm and the DOJ. A
10 review of these documents clearly indicates that AUSA Damm disclosed to the DOJ any
11 potential conflicts of interests. The DOJ was aware of the pending *Bivens* action as well as this
12 Court’s (Judge Pro) ruling regarding immunity. Thus, the Court finds that AUSA Damm did not
13 make any misrepresentation to Judge Johnston or this Court regarding DOJ’s knowledge or
14 clearance with regards to potential conflicts.

15 **III. Federal Statutory Provisions**

16 Defendants also contend that certain statutory provisions relating to executive officials
17 engaged in prosecutions required AUSA Damm to recuse himself in this action. Specifically,
18 Defendants argue the following provisions require disqualification in this case: (1) 18 U.S.C. §
19 208; (2) 28 U.S.C. § 528; and (3) 28 C.F.R. §§ 45.1 and 45.2

20 First, 18 U.S.C. § 208(a) states in part that any executive employee who “participates
21 personally and substantially as a Government officer or employee, through decision, approval,
22 disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial
23 or other proceeding” in which such employee has a financial interest is guilty of a crime
24 punishable by imprisonment or a fine. 18 U.S.C. §§ 208, 216. According to Defendants, AUSA

1 Damm has a financial interest in this prosecution because he is a named defendant in the *Bivens*
2 action. Thus, Defendants assert that AUSA Damm violated § 208 and the Court should therefore
3 disqualify him from this case.

4 Defendants' argument fails. Defendants neglect to point out that § 208 also provides that
5 if the executive employee discloses the conflict and receives clearance, then the government
6 official may participate in the judicial proceeding or other investigatory matters. *See* § 208(b)(1).
7 As discussed above, Damm fully disclosed his potential conflicts of interest with the DOJ, which
8 then approved his participation and prosecution in this case. Thus, Damm did not violate § 208
9 and this argument alone does not necessitate disqualification under § 208(a)(1). Defendants also
10 cite 28 U.S.C. § 528 to support their argument. Section 528 requires the Attorney General to
11 promulgate rules and regulations requiring disqualification of U.S. Attorneys who have, among
12 other things, a financial interest in a particular investigation. Just as with § 208, AUSA Damm
13 complied with the regulations requiring disqualification by disclosing his situation to the DOJ
14 and those in charge of making ethics decisions.

15 The Government's adherence to its standardized procedure and its conduct of an internal
16 review on this issue is commendable and helpful, but it, of course, is not dispositive. The
17 question whether Defendants' rights were violated is not left for their adversary to determine,
18 but is for a court of law. While this Court finds that AUSA Damm did not violate the above
19 mentioned statutory provisions, the Court must also analyze whether AUSA Damm should have
20 recused himself based on constitutional standards set out under the relevant case law. As
21 discussed below, the Court finds that AUSA Damm did not violate Defendants' rights by
22 refusing to recuse himself from this case.

23 **IV. The *Bivens* Action and *Young v. United States***

24 As noted above, AUSA Damm is a named Defendant in the separate civil suit alleging

1 constitutional violations in connection with searches executed in this case. Defendants claim this
2 fact disqualifies Mr. Damm because he has a proprietary interest in the outcome of this
3 prosecution, and because his participation in this case creates an appearance of impropriety.

4 First, according to Defendants, Judge Johnston applied the incorrect standard in deciding
5 the Motion to Disqualify. Judge Johnston required Defendants to establish by clear and
6 convincing evidence a prima facie case of misconduct on the part of AUSA Damm. (*See* #1101
7 at 4) (citing *United States v. Kember*, 685 F.2d 451, 458 (D.C. Cir. 1982) and *United States v.*
8 *Heldt*, 668 F.2d 1238, 1277 n.80 (D.C. Cir. 1981)). Defendants argue *Kember*'s clear and
9 convincing standard was overruled in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S.
10 787 (1987). *Young* held that courts generally may appoint private attorneys to prosecute
11 contempt charges, but that the district court erred in appointing private counsel in that case
12 because he was also beneficiary of the court order on which the contempt action was based. *Id.*
13 793. Thus, Defendants imply that because AUSA Damm could be a benefactor from a jury's
14 finding of guilt in this case, the Court must disqualify him. However, the law does not require
15 a per se disqualification when a federal prosecutor is also named as a defendant in a separate
16 action. *See United States v. Lorenzo*, 995 F.2d 1448, 1453 (9th Cir. 1993) (noting that a court
17 need not disqualify a U.S. Attorney when the charges filed were brought on objective or
18 impartial grounds); *see also Heldt*, 668 F.2d at 1277-79. If this were the case, any defendant
19 could simply file a separate civil suit against the prosecutor to remove her from the case.
20 Furthermore, the appointment in *Young* involved a private attorney's appointment by a court's
21 inherent judicial power. Here, AUSA Damm was appointed by an executive department acting
22 pursuant to statutory law. A properly appointed U.S. Attorney is entitled to a "presumption of
23 impartiality as a 'servant of the law.'" *United States v. Terry*, 806 F. Supp. 490, 494 (S.D.N.Y.
24 1992) (quoting *Young*, 481 U.S. at 803). As such, disqualification "could not be justified by

1 mere inference from the filing of the suit but would require proof, by clear and convincing
2 evidence, of a prima facie case of misconduct on part of the AUSA.” *Kember*, 685 F.2d at 458.

3 In the case at bar, Defendants have neither presented clear and convincing evidence of
4 prosecutorial misconduct nor an appearance of such. AUSA Damm’s participation in this case
5 does not violate Defendants’ constitutional rights to a fair trial. The facts in this case fail to
6 support the claim that the criminal charges were either brought or prosecuted to encourage
7 Defendants to dismiss their civil suit. In addition, Defendants have failed to present evidence
8 that AUSA Damm has acted in an improper manner in hopes to affect the pending *Bivens* action.

9 As this Court has noted in a prior Order, the government had previously acquired, as the affidavit
10 for the search warrant fully supports, substantial evidence and probable cause of alleged criminal
11 offenses which no responsible U.S. Attorney could refuse to prosecute. The Government
12 requested the search warrants to obtain corroborative evidence of crimes that were fully
13 articulated in the supporting affidavit. Moreover, the Ninth Circuit has stated (in a case decided
14 after *Young*) that a criminal defendant complaining of an appearance of conflict ““has cause to
15 complain only if he was prejudiced.”” *Lorenzo*, 995 F.2d 1453 (quoting *Heldt*, 215 668 F.2d at
16 1277). Defendants cannot demonstrate any prejudice in this case. As noted above, the
17 Government had sufficient evidence supporting the charges against Defendants. Further,
18 Defendants cannot point to any actions since the time they filed their *Bivens* claim that AUSA
19 Damm has acted improperly. Defendants contend that this Court’s (Judge Pro’s) Order in the
20 civil action denying in part AUSA Damm’s absolute immunity establishes misconduct. (*See*
21 *Docket #57*, 2:03-cv-1238-DAE-RJJ.) However, such an order is not clear and convincing
22 evidence of misconduct. That Order ruled on the defendants’ motion to dismiss in the *Bivens*
23 action. On a motion to dismiss, a court views the facts in the light most favorable to the plaintiff
24 and accepts as true any well-pleaded allegations.

1 The Court rejects Defendants' argument that AUSA Damm's involvement in this case
2 has violated their due process rights. In addition, the Court rejects Defendants' contentions that
3 AUSA Damm's participation in this case creates an appearance of impropriety based on the fact
4 he is a named Defendant in the separate *Bivens* action.

5 **V. Vindictive Prosecution**

6 Defendant Loglia also argues that the Court must disqualify AUSA Damm based on
7 vindictive prosecution. Loglia contends that AUSA demonstrated prosecutorial vindictiveness
8 when he sent a copy of the indictment to the UNLV law school while he was a student. "To
9 establish a prima facie case of prosecutorial vindictiveness, a defendant must show either direct
10 evidence of actual vindictiveness or facts that warrant an appearance of such." *United States*
11 *v. Montoya*, 45 F.3d 1286, 1299 (9th Cir. 1995) (quoting *United States v. Sinigaglio*, 942 F.2d
12 581, 584 (9th Cir. 1991)). "Evidence indicating a realistic or reasonable likelihood of
13 vindictiveness may give rise to a presumption of vindictiveness on the government's part." *Id.*
14 (quoting *United States v. Garza-Juarez*, 992 F.2d 896, 906 (9th Cir. 1993)). "However, the
15 Supreme Court has emphasized that this presumption must be supported, because at the pretrial
16 stage, the prosecutor's assessment of the proper extent of prosecution may not have crystallized."
17 *Id.* (internal quotations and citation omitted). "While most vindictive prosecution cases involve
18 re-indictment of a defendant, the mere filing of an indictment can support a charge of vindictive
19 prosecution." *Id.* (citation omitted). However, Defendant "must still prove an improper
20 prosecutorial motive through objective evidence before any presumption of vindictiveness
21 attaches." *Id.* (citing *United States v. Goodwin*, 457 U.S. 368, 380 n.12 (1982)). Defendant fails
22 to prove an "improper prosecutorial motive," and thus he fails to establish vindictiveness.

23 Loglia contends that AUSA Damm's mailing of the declaration and indictment raises the
24 presumption of vindictive prosecution beyond any doubt, and that such mailing is objective

1 evidence that proves an improper prosecutorial motive. If these actions raise a presumption of
2 vindictiveness, the Government must then show “independent reasons or intervening
3 circumstances [that] dispel the appearance of vindictiveness and justify its decisions.” *United*
4 *States v. Hooton*, 662 F.2d 628, 634 (9th Cir. 1981).

5 Judge Johnston noted that the documents which AUSA Damm mailed are public
6 documents. Loglia argues Damm mailed these documents to retaliate for the *Bivens* action. As
7 discussed in conjunction with earlier orders, Defendants have not demonstrated retaliatory
8 conduct on Damm’s behalf for bringing this case. Further, as Judge Johnston pointed out, AUSA
9 Damm did not indict all the plaintiffs in the *Bivens* action, suggesting that he was not “out to get”
10 those who filed the *Bivens* action. It is noted that approval for further prosecution of these
11 Defendants was given from central DOJ. Further, AUSA Damm did not mail the documents to
12 other entities with which Loglia associated. In addition, in a separate hearing, the Government
13 noted it believed the school would more likely cooperate in producing information if the school
14 knew the reasons underlying the indictment. Loglia fails to “show either direct evidence of
15 actual vindictiveness or facts that warrant an appearance of such.” *United States v. Montoya*,
16 45 F.3d 1286, 1299 (9th Cir. 1995) (quoting *United States v. Sinigaglio*, 942 F.2d 581, 584 (9th
17 Cir. 1991)). Thus, the Court denies Loglia’s request to disqualify AUSA Damm.

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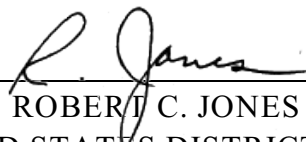
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CONCLUSION

Pursuant to the above analysis, IT IS HEREBY ORDERED that Defendants' Objections to Magistrate Judge Johnston's Order and Request to Disqualify AUSA Damm (#1195) is *denied*. IT IS FURTHER ORDERED that Defendants' Motions for Joinder (#1215, #1281, #1306, #1341, and #1317) are *granted*.

DATED : July 13, 2007



ROBERT C. JONES
UNITED STATES DISTRICT JUDGE